Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF TEXAS, *Petitioner*

vs.

SIERRA CLUB, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDIX

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June 26, 1996

QUESTION PRESENTED

1. Does the Eleventh Amendment preclude a federal district court from imposing "monitor's costs" on the State of Texas, a defendant intervenor seeking to protect its self-governing rights and powers and sovereignty, when the United States has not abrogated Texas' Eleventh Amendment sovereign immunity and Texas, furthermore, did not waive its sovereign immunity?

PARTIES TO THE PROCEEDING

Petitioner (Defendant-Intervenors)

State of Texas
Danny McFadin, Tommy Walker and Carl Muecke

Respondent (Plaintiff-Appellee)

Sierra Club

Intervenor-Plaintiffs-Appellees

Green Valley Special Utility District
Guadalupe-Blanco River Authority
City of San Marcos
City of New Braunfels and New Braunfels Utilities
Bexar Metropolitan Water District
Green Valley Water Supply Corp.
Atascosa Rural Water Supply Corp.

Defendants

Bruce Babbitt, in His Official Capacity as Secretary of the Department of the Interior
United States Fish and Wildlife Service

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INTRODUCTION

This is a petition for *writ of certiorari* on a very narrow issue, although it is an issue of critical importance to the states of the Union. In the decision for which the State of Texas seeks review, the Court of Appeals for the Fifth Circuit held that the State of Texas ("Texas") must pay for a portion of the "monitor's costs" associated with efforts purposed at establishing a federal court-imposed groundwater management regime for the Edwards Aquifer. Texas was so ordered even though it had not been adjudged guilty of any wrongdoing and no relief was ever ordered against Texas.

This case was initiated by a private party acting as a "private attorney general" under the citizen suit provision of a federal statute, *i.e.*, the Endangered Species Act of 1972, 16 U.S.C. 1531, *et seq.*, (the "ESA"). The defendants were the Secretary of the Department of the Interior of the United States and the United States Department of the Interior. Deeply concerned about the ramifications of the action on state and local self-government and delivery of state programs and services, Texas intervened in the action in order to protect and preserve its self-governing and sovereignty powers.[1]

Eventually, in ordering a stay of proceedings at the behest of the State of Texas (and the other defendant-intervenor, the Texas Farm Bureau), the Fifth Circuit acknowledged the potential conflict between two groundwater management or regulatory schemes--one based on a federal endangered species protection statute and a

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[1] The importance of Texas' intervention became clearly evident when the plaintiff was granted permission in 1995 to amend its original complaint nearly two years after trial and judgment. The proposed amended complaint would have expanded the scope of the case by several magnitudes and could have resulted in two competing groundwater management systems in central Texas, one established by the Texas legislature, the other under the aegis of a federal district court. Texas sought and was granted a writ of mandamus directing the district court judge to set aside his order allowing the proposed amendment. *See* Appendix B.

federal court's willingness to implement a federal regulatory program, and one based on state constitutional, statutory, and longstanding common law and the state legislature's efforts to manage central Texas' most vital resource in accordance with the will of Texas' citizens. *See* Appendix C5 (discussion regarding whether the federal district court should abstain from further proceedings).

In an era of increasing citizen suit actions brought under federal statutes by "private attorneys general," it is critical that the states be able to intervene in such actions in order to ensure that state and local self-governing interests are fully protected and not given short shrift by the parties. Federal court efforts to exact costs from the states seeking to vindicate and protect those self-governing rights and powers in fora not sought or chosen by them will chill the states' efforts to protect their self-governing rights and powers. The penalty for seeking to protect and vindicate state self-governing rights and powers should not be exposure of state coffers to payment for federal court-appointed "monitors"--especially when the state has not been adjudged guilty of any wrongdoing or otherwise liable.

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Fifth Circuit, filed July 2, 1993 (Appendix A), is reported at 995 F.2d 571.

On June 19, 1995, the Court of Appeals entered a mandamus order directing the District Court for the Western District of Texas to set aside its order allowing the plaintiff to amend its complaint. ("Writ of Mandamus."). Appendix B.

On October 18, 1995, the Fifth Circuit stayed proceedings in the district court other as specified specified in the stay order. ("Stay Order"). Appendix C.

On February 26, 1996, the Court of Appeals affirmed the district court's order appointing a monitor, assessed the monitor's costs, and remanded with instructions to conclude the case.

("Termination Order"). Appendix D. A petition for rehearing was denied by the Fifth circuit on March 28, 1996. The Termination Order is the decision for which the State of Texas now seeks review by the Court. The State of Texas, however, is only seeking review of the monitor cost assessment issue.

The monitor was appointed by the district court on February 25, 1994 ("Monitor Order"). Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was filed on February 26, 1996. The State of Texas' motion for rehearing was denied on March 28, 1996. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. III
United States Constitution, amendment XI
16 U.S.C. § 1540(g)(1)(A)
These provisions are printed in Appendix F.

STATEMENT OF THE CASE

Proceedings Below

May 17, 1991: Sierra Club filed its lawsuit against the United States in U.S. District Court, Western District, Texas, Midland Division.

January 6, 1992: Court granted the State of Texas intervenor status. It was aligned as an intervenor defendant. (Two state agencies--the Texas Water Commission (now the Texas Natural Resource Conservation Commission) and the Texas Parks and Wildlife Department)--had sought to intervene as intervenor

plaintiffs. One state agency--the Texas Department of Agriculture--had sought to intervene as intervenor defendant.)

February 1, 1993: The district court issued its judgment ("Amended Judgment") setting minimum springflows at which endangered species are "taken" or at which "jeopardy" under the Endangered Species Act supposedly occurs and requiring that the United States Fish and Wildlife Services to take certain actions, such as developing a recovery plan under the Endangered Species Act. The judgment also ordered that Plaintiffs could seek appropriate relief after the last day of the legislative session then in process "if the State of Texas does not have in effect at such time . . . a regulatory system." The State of Texas was not found guilty of any wrongdoing or otherwise liable.

July 2, 1993: Fifth Circuit issued its decision that no case or controversy remained and dismissed the appeals filed by the State of Texas and the Texas Farm Bureau for lack of jurisdiction. *Sierra Club v. Babbitt,* 995 F.2d 571 (5th Cir. 1993). This decision was based upon the court of appeals finding that the State of Texas had not been found liable. *Id.* at 575. ("The appellants [*i.e.*, the State of Texas and the Texas Farm Bureau] allege numerous injuries from the district court's judgement , but we decide that the judgment and findings are of no consequence to them. On its face, the judgment orders nothing of the appellants. Nor will the judgment affect the appellants in any future litigation, because the only issue necessarily decided by the district court is that *FWS* has a nondiscretionary duty to promulgate springflow information." Emphasis in original.) The defendant United States had earlier dropped its appeal of Judge Bunton's order after settling with the plaintiffs.

February 25, 1994: District Court issued its order (the "Monitor Order") appointing a monitor. *See* Appendix E.

February 28, 1995: Upon motion by Sierra Club, District Court dismissed the Texas Department of Agriculture as a party. The Department of Agriculture appealed its dismissal, as well as the Monitor Order.

May 8, 1995 : The district court granted Sierra Club's motion to amend its complaint.

June 19, 1995: In response to a motion made by the State of Texas, the Fifth Circuit issued a mandamus directing the district court to set aside its order granting the Sierra Club's motion to amend its complaint.

October 18, 1995: Fifth Circuit issued order staying the monitor's activities.

February 14, 1996: Federal defendants filed their recovery plan in response to the Final Judgment.

February 26, 1996: Fifth Circuit issued order affirming appointment of monitor and assessment of his costs. The order also ordered that the District Court take steps necessary to conclude the case.

REASONS FOR GRANTING THE WRIT

1. This Court should determine whether, in view of the Strong State Sovereign Immunity Precepts Set Forth in *Seminole Tribe of Florida v. Florida*, a federal court may order a state to pay for "monitor's costs" when the state, a Defendant Intervenor, was not found guilty of any wrongdoing or otherwise liable.

Texas files this petition on the grounds that the Eleventh Amendment[2] protects state treasuries from being required to pay such court costs as the monitor's fees in this case. Texas, or rather the taxpayers of Texas, have paid over $100,000 for the monitor's activities. The Eleventh Amendment limits the award of money from a state's treasury. "Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determination." *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S.Ct. 394, 404 (1994). "One of the most important goals of the immunity of the Eleventh Amendment is to shield state's treasuries. (citation omitted)." *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n,* 762 F.2d 435, 440 (5th Cir. 1983), *cert. denied* 474 U.S. 1057 (1986). Protection of state treasuries is especially important when states have not been adjudged guilty of any wrongdoing or otherwise liable as a party defendant, such as the State of Texas in this case.

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[2] The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

The Supreme Court has construed the Eleventh Amendment as also barring suits against a state by its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890)

As this Court squarely held in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1131 (1996)("*Seminole*"), the Eleventh Amendment is a bar to the exercise of subject matter jurisdiction by the federal courts in suits brought by citizens of a State against that State.[3] *See Hans v. Louisiana*, 134 U.S. 1 (1890). "The Court has recognized that the significance of the Amendment 'lies in its affirmation that he fundamental principle of sovereign immunity limits the grant of judicial authority of Art. III of the Constitution. *Pennhurst State Sch. & Hosp. v. Halderman*, [465 U.S. 89, 98] (1984).'" *Welch v. Texas Dep't of Highways and Public Transp., et al.*, 483 U.S. 468, 472 (1987). The district court had no jurisdiction to order Texas to pay for the monitor's costs in clear derogation of the protections of sovereign immunity contained in the Eleventh Amendment.

There are two ways in which the Eleventh Amendment immunity may be lost, however. First, Congress can, in certain instances, abrogate the state's immunity. In light of *Seminole*, it appears plain that Congress lacks constitutional authority simply to *abrogate* Texas' Eleventh Amendment immunity pursuant to

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[3] Being such a jurisdictional bar, it is questionable whether a state can meaningfully waive its Eleventh Amendment right and thereby confer jurisdiction on a federal court. Justice Stevens in his dissenting opinion recognized that the Court's decision in *Seminole* casts doubt on whether Congress has the power to abrogate a state's sovereign immunity in cases involving environmental law, including the Endangered Species Act, and thereby confer Article III jurisdiction on federal courts:

> The importance of the majority's decision to overrule the Court's holding in *Pennsylvania v. Union Gas Co.* [491 U.S. 1 (1989)] cannot be overstated. The majority's opinion . . . prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, *environmental law*, and the regulation of our vast national economy.

Seminole at 1134 (STEVENS, J., dissenting) (emphasis added).

Article I through legislation enacted under the Commerce Clause. *See id.*, 116 S.Ct. at 1126 (no "principled distinction" may be drawn between various Article I powers). "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 116 S.Ct. at 1131-32. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Eleventh Amendment is limited by the enforcement provisions of the Fourteenth Amendment).

Even if, however, Congress had the power to abrogate state sovereign immunity pursuant to its powers under the Commerce Clause, such abrogation must be, in any event, unmistakable and clear. "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.' [*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)]." *Seminole*, 116 S.Ct. at 1123. The pertinent language of the ESA, far from indicating Congress' clear intent to abrogate a state's Eleventh Amendment immunity, emphasizes Congress' solicitude for state sovereignty and immunity from suit. 16 U.S.C. § 1540(g)(1)(A).[4]

Congress does not have the power to abrogate state sovereign immunity under the Commerce Clause and, indeed, Congress did not attempt to abrogate state sovereign immunity under the ESA.

In addition, however, to Congress' limited power to abrogate state sovereignty in certain instances, a state may be able to waive its immunity and consent to be sued in federal court.

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[4] 16 U.S.C. § 1540(g)(1)(A) provides:

> (g) Citizen suits
>
> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf —
>
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency *(to the extent permitted by the eleventh amendment to the Constitution)*, who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or . . . (empasis added)

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). As described below this is not the case here.

2. This Court should determine whether the State of Texas, As A Matter of Fact, waived its Eleventh Amendment rights, and whether for Eleventh Amendment Purposes, Agencies of the State of Texas had the Right or Power to Waive the State's Eleventh Amendment Rights.

In its Termination Order, the Fifth Circuit upheld the assessment of monitor costs against Texas "because Texas [had] injected itself into the remedial process by asking to participate in the creation of its own plan for management of the Edwards." Termination Order at p. 11-12. However, the Fifth Circuit, in its opinion of July 2, 1993, had made the following conclusions about the district court's amended final judgment:

. . . the district court enjoined the [United States Fish and Wildlife Service] to develop and disseminate information about the springflows necessary to sustain the endangered species at San Marcos and Comal Springs. *The court did not order further relief against FWS, nor did it order relief against anyone other than FWS.*

Sierra Club v. Babbitt, 995 F.2d 571, 574 (5th Cir. 1993) (emphasis added). The Fifth Circuit correctly justified its conclusion that the district court "did not order relief against anyone other than FWS" by noting that:

> The court did enjoin the [Texas Water Commission or "TWC"] to prepare a comprehensive Edwards management plan, *but TWC asked to be assigned this task, has already performed it*, and no one complains about this part of the district court's judgment on appeal.

Id. at 574, footnote 4 (emphasis added). Moreover, and just as importantly, the TWC (now the Texas Natural Resources Conservation Commission ("TNRCC")) was not a defendant. Thus, this portion of the Final Judgment, although not appealed, was not supported by the pleadings. Consequently, Texas avers that this Court's basis for upholding the assessment of monitor's costs[5] against Texas in its Termination Order is inconsistent with this Court's prior ruling as well as Eleventh Amendment jurisprudence.

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[5] Fees of a special master or a monitor are considered court costs. FED. R. CIV. P. 53, 54(d)(1); *Nat'l Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 545 (9th Cir. 1987); *Newman v. State of Alabama*, 559 F.2d 283, 290 (5th Cir. 1977). In *Kentucky v. Graham*, 473 U.S. 159, 164 (1985), the Court considered whether a state could be assessed attorneys' fees as costs under the Civil Rights Attorneys Fees Act, 42 U.S.C. § 1988 when a Plaintiff prevails in a suit against government employees only in their individual capacities. The Court held that it could not, noting:

> [l]iability on the merits and responsibility for fees go hand in hand. Where a defendant has not been prevailed against, either because of legal immunity or on the merits, section 1988 does not authorize a fee award against the defendant.

Id. at 164.

In this case, because Texas was not liable on the merits, and because it is legally immune from suit under the Eleventh Amendment, it cannot be held liable for court costs.

A. Texas did not waive its sovereign immunity; nor can state agenices waive the sovereign immunity of the state without legislative approval.

"Consent to suit against the state in federal court must be unequivocally expressed." *Lelsz v. Kavanagh*, 807 F.2d 1243, 1253 (5th Cir.), *reh'g denied*, 815 F.2d 1034 (1987), *cert. dismissed*, 983 U.S. 1057 (1987), citing *Pennhurst*, 465 U.S. at 99; *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). Because Eleventh Amendment immunity is jurisdictional in nature, waiver of that immunity occurs only where there is an overwhelming indication that "leave(s) no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Like waiver of any constitutional right, waiver of a state's sovereign immunity is strictly construed in favor of the holder of the right. *Edelman*, 415 U.S. at 651, 673; *Lelsz*, 807 F.2d at 1253. Furthermore, "[c]onstructive consent" is not sufficient to overcome immunity. *Edelman*, 415 U.S. at 673.

It is important to note that the Eleventh Amendment is not limited to preventing suits for money damages. The jurisdictional bar against suit applies "regardless of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89. In *Missouri v. Fiske*, 290 U.S. 18, 27 (1933), the Supreme Court noted that "(e)xpressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosection of equitable remedies when these are asserted and prosecuted by an individual against a State."

Waiver of a state's sovereign immunity will only be found when two conditions are met. First, the state must seek distinct affirmative relief. *Clark v. Barnard*, 108 U.S. 436, 448 (1883). Second, the state officer bringing suit on behalf of the state must have the authority to waive the state's immunity. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945). Because neither condition is met in this case, it is clear that Texas has not waived its Eleventh Amendment immunity.

(1) Texas did not seek affirmative relief.

The district court allowed Texas to intervene as a defendant intervenor. A state does not waive its sovereign immunity by simply intervening in an action. *Missouri v. Fiske*, 290 U.S. 18 (1933). Neither does it waive its sovereign immunity by entering an appearance in federal litigation and defending on the merits. *Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972).

In *Fiske*, the state of Missouri intervened as a defendant in a case involving the ownership of stock in an estate. Missouri asked for no affirmative relief, requesting only that the subject matter of the suit not be distributed pending the outcome of a state court adjudication of the state's tax interest. The Court held that the "intervention was too limited in character to constitute a waiver of the immunity given by the Eleventh Amendment." 290 U.S. at 20.

As in *Fiske*, nothing in Texas' conduct indicated its consent to waive its immunity. To the contrary, Texas was granted leave to intervene as a defendant. Texas filed a general answer and asked for no relief. The State of Texas was not sued in this litigation, it intervened to ensure that Texas' self-governing rights and powers as they relate to the ownership, management, and regulation of groundwater would be protected. The portion of the order enjoining Texas to prepare a management plan was not supported by any pleadings. The final judgment entered by the district court was narrow and found no liability on the part of Texas. *Sierra Club*, 995 F.2d 575.

In addition, the district court never ordered Texas to do anything that it had not already done. At the time of the district court's order, Texas had already prepared a regulatory plan with respect to the Edwards Aquifer. *Id.* at 574 n.4. Being ordered to do an act which it has already performed is not the type of involvement in a case that waives constitutionally-protected immunity from suit. This Court of Appeals implicitly recognized this when it held that even though Texas had been enjoined to prepare a management plan for the Edwards Aquifer, Texas had no

standing to appeal at that time because the Court had not ordered any relief against it. *Id.* at 574.

Texas asks this Court to review the assessment of monitor's fees against it because such assessment based on the rationale that "Texas injected itself into the remedial process by asking to participate in the creation of its own plan for management of the Edwards" is inconsistent with the Fifth Circuit's earlier holding that the district court "did not order relief against anyone other than FWS."

(2) For Eleventh Amendment Purposes, State Agencies, Including the Office of the Attorney General, do not have the Authority to Waive the State's Sovereign Immunity.

Texas state agencies and the Attorney General do not have the authority to waive Texas' sovereign immunity. The authority of a state official to consent to suit in a federal court cannot be presumed in the absence of clear statutory language. *Ford*, 323 U.S. at 468. Whether a particular state officer has the authority to waive that state's Eleventh Amendment immunity is a question of state law. *Id.* at 466; *Dagnall v. Gugenheimer*, 645 F.2d 2 (5th Cir. 1981).

The TNRCC has no authority to waive Texas' immunity. Indeed, neither does the Texas Attorney General. "An admission, agreement, *or waiver* made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state." TEX. GOV'T CODE § 402.004 (Vernon 1990) (emphasis added).

In *Dep't of Pub. Safety v. Great Southwest Warehouse, Inc.*, 352 S.W.2d 493 (Tex. Civ. App. - Austin 1961, writ ref'd n.r.e.), the Texas Court of Civil Appeals held that the Attorney General is without legal authority to waive the state's immunity from suit because waiver of immunity is the exclusive prerogative of the state legislature. *Id.* at 495. Only the state legislature can waive the sovereign immunity of the state.

In *Dagnall*, the Fifth Circuit held that attorneys for the State of Louisiana were not given the authority to waive the state's sovereign immunity. *Dagnall*, 645 F.2d at 3. Similarly, the Tenth Circuit has held that lawyers for New Mexico school boards are not empowered to waive the sovereign immunity of the school boards. Such waivers could only be made by the state legislature. *Garcia v. Bd. of Educ. of the Corro Consol. Sch. Dist.*, 777 F.2d 1403 (10th Cir. 1985).

Likewise, only the Texas legislature has the authority under state law to waive the State's sovereign immunity. State agencies, including the Texas office of the Attorney General, do not have that waiver authority. Any such attempt by a state agency to waive the State's sovereign immunity would be nugatory. A state's intervention in an action in order to protect its self-governing power and sovereignty, furthermore, does not vitiate the state's sovereign immunity and cannot serve as the predicate for raiding the state's coffers.

CONCLUSION

The petition for *writ of certiorari* should be granted.

Respectfully submitted,

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June 26, 1996

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8123

SIERRA CLUB,

Plaintiff-Appellee,

and

GREEN VALLEY SPECIAL UTILITY DISTRICT, ET AL.,

Intervenor-Plaintiffs-Appellees,

v.

BRUCE BABBITT, Etc., ET AL.,

Defendants-Intervenors-Defendants-Appellants,

and

UNITED SERVICES AUTOMOBILE ASSOCIATION, ET AL.,

Intervenors-Defendants-Appellants,

Appeals from the United States District Court the for the Western District of Texas

Before REAVLEY and GARWOOD, Circuit Judges, and LAKE[1], District Judge.

REAVLEY, Circuit Judge:

Because the district court's judgment imposes no injury upon the parties moving this appeal, no case or controversy remains. Lacking jurisdiction, we dismiss.

The Sierra Club sued the United States Fish and Wildlife

[1] District Judge of the Southern District of Texas, sitting by designation.

Service and Interior Secretary Lujan (collectively FWS) for violating the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, by failing to adopt and implement plans to protect various endangered species that live in the San Marcos and Comal Springs of Central Texas. The district court admitted several governmental entities as plaintiff-intervenors, and opposing governmental entities and private water users as defendant-intervenors. After trial, the district court enjoined FWS to generate and disseminate information about the springflows necessary to protect endangered species at San Marcos and Comal Springs. FWS appealed, but later agreed to dismiss its appeal if the plaintiffs joined a "Motion to Clarify the Judgment and Findings," which did not affect the relief ordered against FWS. The plaintiffs joined the motion, the district court amended its findings and judgment in accord with the motion, and FWS dismissed its appeal. Several defendant-intervenors wish to continue an appeal in the absence of FWS. We dismiss for want of jurisdiction.

I. BACKGROUND

The Edwards Aquifer (Edwards) stores water in a natural underground reservoir that stretches through six counties in Central Texas. Rainfall seeps through porous earth to "recharge" Edwards all along its path, and the water in the aquifer flows eastward. Many governments, corporations, and individuals, including appellants, pump water from Edwards. Depending on the amount that recharge exceeds pumping, water leaves Edwards naturally at two large springs, San Marcos Springs and Comal Springs, situated approximately fifteen miles apart at the aquifer's eastern edge.

San Marcos Springs and dependent streams are home to four species listed by the federal government as "endangered" (the Fountain Darter, the Texas Blind Salamander, the San Marcos Gambusia (which may now be extinct), and Texas Wild Rice) and one listed as "threatened" (the San Marcos Salamander). *See* 50 C.F.R. §§ 17.11-.12 (1992). Comal Springs and dependent streams are the only other home worldwide to the Fountain Darter and the San Marcos Salamander. Until June 1993, Texas placed no restrictions on pumping from Edwards, so no guarantee existed that

water for these species would come from San Marcos or Comal Springs although all of the species depend on water for their survival.

In May 1991, Sierra Club sued FWS, alleging that endangered species died when flow from the San Marcos and Comal Springs dropped below a certain number of cubic feet per second. Sierra Club asserted that FWS was responsible for the loss of these creatures under the ESA because FWS failed to develop and disseminate information about the minimum springflows necessary to protect the endangered species, and because FWS failed to exercise its authority under the ESA to impose pumping restrictions to maintain the necessary springflows. Several governmental entities who are interested in maximizing springflow from San Marcos and Comal Springs intervened as plaintiffs,[2] and an opposing set of governmental entities and private water users interested in preserving the right to pump Edwards water without limitation intervened as defendants.[3] Subsequently, Sierra Club and all plaintiff-intervenors amended their complaints to strike their claim that the ESA required FWS to regulate pumping from Edwards; but they continued to press their claim that the ESA requires FWS to determine the minimum springflows necessary to preserve the endangered species at San Marcos and Comal Springs.

Judge Bunton conducted a bench trial and issued comprehensive findings and conclusions in February 1993. He

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[2] Plaintiff-intervenors include the Guadalupe-Blanco River Authority, the City of San Marcos, the City of New Braunfels, New Braunfels Utilities, Green Valley Special Utility District, Atascosa Rural Water Supply Corporation, and Bexar Metropolitan Water District.

[3] Defendant-intervenors include the Texas Department of Agriculture, the Texas Water Commission (TWC), the Texas Parks and Wildlife Division, the City of San Antonio, the Greater San Antonio Builders Association, United Services Automobile Association, Redland Stone Products Company, Southwest Research Institute, USAA Real Estate Company, Southwest Foundation for Biomedical Research, Living Waters Artesian Springs, Ltd., Danny McFadin, Tommy Walker, and Carl Muecke.

concluded that FWS has a nondiscretionary duty under ESA § 4(f), 16 U.S.C. § 1533(f), to "develop and implement ... recovery plans" for endangered species, and that FWS neglected its section 4(f) duty with respect to the four endangered species at San Marcos and Comal Springs. He also held that FWS "took" Fountain Darters in violation of ESA § 9, 16 U.S.C. § 1538, by failing to promulgate springflow limits before droughts in 1989 and 1990. Based on these conclusions, the district court enjoined FWS to develop and disseminate information about the springflows necessary to sustain the endangered species at San Marcos and Comal Springs. The court did not order further relief against FWS, nor did it order relief against anyone other than FWS.[4] This judgment satisfied the plaintiffs, but FWS and several defendant-intervenors appealed.

When Interior Secretary Babbitt replaced Interior Secretary Lujan, FWS changed its position in this case. FWS agreed to dismiss its appeal if the plaintiffs agreed to certain semantic changes in the district court's findings and judgment;[5] none of the changes affect the relief ordered against FWS. The plaintiffs joined FWS's Motion to Clarify the Judgment and Findings, the district court amended its findings and judgment to conform with the parties' motion, and FWS dismissed its appeal. However, several defendant-intervenors wish to continue their appeals.[6] The appellees argue that the appellants have no standing absent FWS, and that we have no jurisdiction to decide these appeals.

II. ANALYSIS

The Constitution's Article III limits the federal judiciary's

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[4] The court did enjoin TWC to prepare a comprehensive Edwards management plan, but TWC asked to be assigned this task, has already performed it, and no one complains about this part of the district court's judgment on appeal.

[5] Most significantly, the amended findings recite "that the absence of knowledge," rather than FWS's recalcitrance, caused takings of and jeopardy to Fountain Darters in 1989 and 1990.

[6] Appellants include all parties listed in note 3, *supra*, except: the Texas Parks and Wildlife Division and Living Waters Artesian Springs, Ltd.

decisional authority to "cases" and "controversies." A case or controversy does not exist unless the person who asks the court for a decision has "standing" to do so, the elements of which are injury, causation, and redressability. *See Lujan v. Defenders of Wildlife,* --- U.S. ----, ----, 112 S.Ct. 2130, 2136 (1992). A party's "status as an intervenor ... does not confer standing sufficient to keep the case alive in the absence of [the party on whose side the intervenor intervened]." *Diamond v. Charles,* 476 U.S. 54, 68, 106 S.Ct. 1697, 1706 (1986). Rather, intervenors who wish to prosecute an appeal on their own must separately fulfill the injury, causation, and redressability requirements of Article III. *Id.*

Where standing to appeal is at issue, appellants must demonstrate some injury *from the judgment below. See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3902, at 63 (1992). The judgment here simply requires FWS to develop and disseminate springflow information based on the court's finding that ESA § 4(f) places a nondiscretionary duty on FWS to generate this information. In its judgment, the district court also makes "interim springflow findings for all purposes under the ESA" at which various endangered species are "taken" or "jeopardized" within the meaning of the ESA. Because these findings are irrelevant to whether FWS has a duty to develop and disseminate springflow information, they have no preclusive effect in future litigation. *See Hicks v. Quaker Oats Co.,* 662 F.2d 1158, 1166 (5th Cir.1981) (No issue can be precluded unless "the determination of the issue in the prior litigation [was] a critical and necessary part of the judgment."). Counsel for plaintiffs agreed at oral argument that the springflow numbers adopted by FWS are subject to challenge in any subsequent enforcement suit under the ESA.

Moreover, because FWS has agreed to the amended judgment and it grants relief only against FWS and merely requires it to develop and disseminate factual information having no legal consequence and which FWS would be free to develop and disseminate absent the judgment, and because intervenor-defendants, including the TWC, are not bound by such information

or its dissemination (and are as free to subsequently contest it as if it were not made pursuant to the judgment), none of the findings or declarations in the amended judgment (or in the amended findings of fact and conclusions of law) are necessary to the relief ordered against FWS. Thus none of such findings or declarations have preclusive effect on appellants in future litigation, and appellants otherwise lack standing to challenge any of them here.

Our decision concerning preclusive effect controls subsequent cases. In *New York Telephone Co. v. Maltbie,* 291 U.S. 645, 54 S.Ct. 443 (1934), a district court enjoined the enforcement of rate orders at the telephone company's behest, and also fixed the value of the telephone company's property and the allowed rate of return on that property. The telephone company appealed because it disagreed with the determinations of property value and rate of return. The Supreme Court simply stated that the court's findings concerning property value and rate of return "are not to be regarded as res judicata ... in any judicial proceeding," and dismissed the appeal. *Id.* at 646, 54 S.Ct. at 443. We follow the same course here to assure the appellants that they will suffer no adverse consequences in future litigation from the judgment and findings in this case. *See also* 15A WRIGHT, MILLER, & COOPER, § 3902, at 83 ("[I]t is better to deny appeal and forbid preclusion than to permit appeal in order to support preclusion.").

The appellants allege numerous injuries from the district court's judgment, but we decide that the judgment and findings are of no consequence to them. On its face, the judgment orders nothing of the appellants. Nor will the judgment affect the appellants in any future litigation, because the only issue necessarily decided by the district court is that *FWS* has a nondiscretionary duty to promulgate springflow information. The appellants cannot legitimately blame the judgment for causing any future litigation; the information ordered by the district court is in no wise a prerequisite to ESA-enforcement litigation. Finally, the judgment inflicts no procedural injury on the appellants--no law accords the appellants a right to participate in FWS's decisionmaking process because the springflow information

mandated by the judgment does not, of itself, bind the appellants, and because the judgment recognizes that FWS may change its springflow determinations at any time in the exercise of its best professional judgment.

DISMISSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50362

IN RE:
THE STATE OF TEXAS and
DANNY McFADIN, TOMMY WALKER
and CARL MUECKE, JR.,

Petitioners.

Petition for Writ of Mandamus
to the United States District Court
Western District of Texas

BEFORE DUHE, WIENER and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition of the State of Texas, and Danny McFadin, Tommy Walker and Carl Muecke, Jr. (collectively, Petitioners), for a writ of mandamus is GRANTED. The United States District Court for the Western District of Texas, Honorable Lucius Bunton presiding, is directed to set aside its order granting the motion of plaintiff, The Sierra Club, to amend its complaint. Once a final judgment has been entered, the district court can authorize amendment of the pleadings pursuant to Rule 15(a) only after setting aside the judgment under either Rule 59 or Rule 60. Dussoy v. Gulf Coast Invest. Corp., 660 F.2d 594, 597 (5th Cir. 1981), 6 Charles A. Wright, et al., Federal Practice & Procedure, § 1489 at 692-93 (1990). As the district court had not thus set aside its final judgment, it was without jurisdiction to grant plaintiff's motion to amend.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No: 94-50260

SIERRA CLUB,
Plaintiff-Appellee,
and
GREEN VALLEY SPECIAL UTILITY DISTRICT, ET AL.,
Intervenor-Plaintiffs-Appellees,
VERSUS

BRUCE BABBITT, in His Official Capacity as
Secretary of the Department of the Interior, ET AL.,
Defendants,
and
STATE OF TEXAS,
Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(CA-MO-91-69)

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No. 95-50165

SIERRA CLUB,
Plaintiff-Appellee,
and
GREEN VALLEY SPECIAL UTILITY DISTRICT, ET AL.,
Intervenors-Plaintiffs-Appellees,

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VERSUS

BRUCE BABBITT, in His Official Capacity as
Secretary of the Department of the Interior, ET AL.,
Defendants,

and

STATE OF TEXAS,
Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(CA-MO- 91- 69)

Before WISDOM, DUHE, and BARKSDALE, Circuit Judges.
PER CURIAM:[1]

These appeals concern post-judgment issues. But, because of significant post-oral argument developments spawning, *inter alia,* abstention concerns, and because one or more of the issues may be moot, we **REMAND,** while retaining jurisdiction.

I.

The Sierra Club filed this action against the Secretary of the United States Department of the Interior, and the United States Fish and Wildlife Service (the Federal Defendants) pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* The action concerns the Edwards Aquifer, five species classified as either endangered or threatened, and the Federal Defendants' duties under the ESA.

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

After a bench trial, the district court entered extensive findings of fact and conclusions of law, and a final judgment. The court granted the relief sought by the Sierra Club in its amended complaint -- it enjoined the Federal Defendants to develop and disseminate information about the springflows necessary to protect the species in issue at the Comal Springs and San Marcos Springs, as well as the minimum water levels in the Edwards Aquifer necessary to protect the species. *See Sierra Club v. Babbitt,* 995 F.2d 571 (5th Cir. 1993)

Nearly a year after the bench trial, and several months after entry of judgment, the Sierra Club moved, pursuant to FED. R. EVID. 706, for appointment of an expert (a "monitor") to aid the court in determining whether any state or federal plan complies with the ESA, and, if not, what action the district court should take. Relying upon its "inherent equitable power to appoint a person . . . to assist it in administering a remedy", *Ruiz v. Estelle,* 679 F.2d 1115, 1161 (5th Cir.), *amended in part, vacated in part,* 688 F.2d 266 5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983), the court designated a monitor (the Monitor Order).

After appealing the Monitor Order, the State of Texas,[2] on behalf of the Texas Department of Agriculture (TDA), moved the district court to stay the monitor's activities, citing, *inter alia*, the assessment of costs for the monitor. In response, the Sierra Club moved to dismiss the TDA from the action. The district court granted the Sierra Club's motion and dismissed the TDA (the TDA Dismissal Order). The State of Texas appeals also the TDA Dismissal Order.

Sierra Club sought to amend its complaint to seek regulatory relief from the State of Texas in April of 1995. Although the district court granted leave to amend, our court issued a writ of mandamus, which overturned that grant. As hereinafter discussed Sierra Club has recently moved this

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[2] Early in the proceedings, the district court granted the State of Texas intervention of right pursuant to FED. R. CIV. P. 24(a).

court to remand the case conditionally to allow them to again broaden the scope of this litigation; the district court has ordered a hearing; and the State seeks a stay. (As also hereinafter discussed, the State's stay motion is GRANTED.)

II.

At issue are: (1) the authority of the district court to appoint the monitor; (2) the assessment of the monitor's costs against the State of Texas, in light of the fact that the final judgment was not against it;[3] and, (3) the dismissal of the TDA. But, subsequent developments, including the long-awaited federal approval for the Edwards Aquifer Authority (EAA) to begin operation may have rendered one or more of these issues moot. (Even if all of the issues are not moot, one thing is clear. It is time for this litigation to end.)

The Texas legislature created the EAA in 1993. Among other things, the EAA is charged with regulating withdrawals of water from the Edwards Aquifer, as well as developing a comprehensive management plan for the aquifer. But, because creation of the EAA implicated section 5 of the Voting Rights Act, 42 U.S.C § 1973c, the State of Texas sought federal approval of the EAA. Subsequent to oral argument on these appeals, the Sierra Club notified this court that the Voting Rights Act hurdle had been finally cleared, and that the EAA would begin operation on or about August 28, 1995.

However, preclearance did not provide the sole obstacle to the operation of the EAA The Medina County Underground Water Conservation District sought state court injunctive relief to prevent the EAA from operating and a declaration that the legislation that created the EAA violated the Texas Constitution. The state court issued a temporary injunction (replacing an August 22 temporary restraining order) on September 1, 1995, that allowed the interim directors to be sworn in, to meet, and to defend themselves, ***but not*** to take any action in furtherance of their legislative mandate to

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[3] This issue daily becomes more troubling.

regulate withdrawal from the Edwards Aquifer. In yet another variation on what might be considered the theme of the Edwards Aquifer saga, these matters too are currently on appeal in Texas state court.

Notwithstanding the appeals in this matter, Sierra Club has continued to actively pursue this litigation in district court. On October 6, the district court set a hearing for October 20, concerning having in place by January 1, 1996, a plan to be implemented either by the district court or by a federal agency designated by that court.

In addition to raising concerns that post-argument developments may have mooted the issues on appeal, this litigation has begun to raise abstention concerns. Two aspects of the facts giving rise to this unduly protracted dispute are particularly troubling in this regard. First, the Edwards Aquifer contains a finite amount of water, and as such, the need for uniform regulation is paramount. The Supreme Court has recognized that such circumstances sometimes require the federal courts to abstain to allow the state's comprehensive regulatory system to operate without risk of competing attempts between that regulator and the federal courts to exercise control over the same entity.[4] Second, the state courts have been called upon to decide the state constitutionality of the creation of the EAA, and thus the

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[4] *Cf. Burford v. Sun Oil Co.*,319 U.S. 315 (1943). As in *Burford*, this dispute arises in conjunction with the regulation of a finite resource of the State of Texas. As with the oil fields at issue in that case, in the present case, Texas clearly has an interest in uniform decision-making regarding this finite amount of water. While we recognize that the EAA was not in existence *before* this litigation, we recognize as well that now both a state agency and a federal court seek to exercise some control over the same property. This dual involvement raises the concern of frustration of a state's regulatory scheme.

specter of duplicative litigation and the impropriety of piecemeal litigation are taking center stage.[5]

III.

As the panel requested at oral argument, the parties have kept us updated on these fast-moving, post-argument events. The early paper movement is gaining momentum and appears to be moving toward becoming an avalanche. It is time to stop, and consider carefully where the parties are and where and how they should proceed.

In the Monitor Order, the district court imposed federal court regulation over the aquifer because of the lack of a satisfactory state regulatory scheme. In light of the state court disputes concerning the EAA, we **REMAND** this matter to the district court for it to conduct additional proceedings, to include receiving additional evidence, and to make additional findings of fact and conclusions of law, in order to determine (1) whether the disputes regarding the EAA compel federal courts to stay their hands; and (2) whether the disputes regarding the Monitor Order and the TDA Dismissal Order are moot, and, if they are, whether a dispute remains among the parties as to the assessment of the monitor's costs against the State of Texas. Because one or more of the issues presented on appeal may still be viable, and, therefore, further appellate proceedings may be pressed we retain jurisdiction. Moreover, all proceedings in district court other than those directed above are **STAYED.** This stay includes any activities by the monitor for which he expects compensation.

REMANDED; JURISDICTION RETAINED

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[5] *Cf. Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976). While we recognize both that the state courts need not assert jurisdiction over the property involved here to decide whether the creation of the EAA comported with the Texas constitution, and that the state courts were not involved at the inception of this litigation, we cannot turn a blind eye to the considerations, underlying *Colorado River,* that duplicative proceedings involving a single *res* create risks of inconsistent outcomes, waste judicial resources, and may render the property at issue unavailable to one court due to the proceedings in another.

D1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50260

SIERRA CLUB,

Plaintiff-Appellee,

and

GREEN VALLEY SPECIAL UTILITY DISTRICT, ET AL.,

Intervenors-Plaintiffs-Appellees,

versus

BRUCE BABBITT, in His Official Capacity as Secretary of the Department of the Interior, ET AL.,

Defendants.

STATE OF TEXAS,

Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(CA-MO-91-69)

****

No. 95-50165

SIERRA CLUB.

Plaintiff-Appellee,

GREEN VALLEY SPECIAL UTILITY, ET AL.,

Intervenors-Plaintiffs-Appellees.

versus

BRUCE BABBITT, in His Official Capacity as Secretary of the Department of the Interior, ET AL.,
Defendants.

STATE OF TEXAS,
Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(CA-MO-91-69)

Before WISDOM, DUHE, and BARKSDALE, Circuit Judges.
PER CURIAM:*

At issue are only post-judgment matters. And, as noted previously, it is time for this litigation to end. Because the district court's appointment of a monitor was reasonable in light of the morass of post-judgment developments in this case and thus not an abuse of the court's discretion in effectuating a judgment, we **AFFIRM** both the appointment of the monitor and the assessment of a portion of his costs against Texas. However, because the relief sought in this action, the creation and dissemination of springflow information by the federal defendants, has been achieved, all other issues are moot; we **REMAND** with instructions to conclude this action.

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

I.

Covering an expanse of about 3,600 square miles, the Edwards Aquifer stretches through several counties in central Texas. It is home to five species identified as either "endangered" or ''threatened."[1]

In 1991, the Sierra Club filed this action against the Secretary of the United States Department of the Interior and the United States Fish and Wildlife Service (the federal defendants) pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* Texas governmental entities and private water users intervened as defendants.[2]

After a bench trial in May 1993, the district court entered findings of fact and conclusions of law, and a final judgment. The court granted the relief sought by the Sierra Club in its amended complaint -- it enjoined the federal defendants to develop and disseminate information about the springflows necessary to protect the species in issue, as well as the minimum water levels in the aquifer necessary to protect them. *See Sierra Club v. Babbitt,* 995 F.2d 571 (5th Cir. 1993). The court ordered that Texas prepare an Edwards management plan; but, it should be noted that Texas sought such an order. *Id* . at 574, n.4.

Several of the intervenor defendants, as well as the federal defendants, appealed. But, when the Sierra Club agreed to certain semantic changes in the district court's findings and judgment, the federal defendants dismissed their appeal. Contending that the remaining appellants lacked standing to appeal, the Sierra Club moved to dismiss the appeal. In support, it stated to our court that its amended complaint

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1 The species are the San Marcos salamander, the fountain darter, the Texas blind salamander, the San Marcos gambusia, and Texas wild rice.

2 Early in the proceedings, the district court granted the State of Texas intervention of right pursuant to FED. R. CIV. P. 24(a).

> considerably narrowed the relief sought, eliminating anything that could be construed as a request that the court order the Federal Defendants to limit or regulate the pumping of water from the Edwards. In particular, the Plaintiffs dropped their request for an injunction against the Federal Defendants "to require enforcement of the [ESA] to *ensure* that the natural springflow from the Comal Springs is at least the minimum required flow at all times", retaining the more modest request that the Federal Defendants be ordered to "determine" the biologically required minimum springflows. The amended complaints, like the original complaints, sought no relief against the Intervenor[s]-Defendants, or any party other than the Federal Defendants.
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> . . . .
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> ... In the amended pleading upon which the case below was tried Plaintiffs did not seek an order directing the [Federal Defendants] or anyone else to achieve pumping restrictions or to take any other action that will mandate pumping reductions. It therefore simply will not work for the Intervenor[s]Defendants to imply that the Judgment below ... "imposer[s] severe restrictions upon the sole, historic water supply of a major city"; or that the court below is attempting ... "to regulate groundwater pumping throughout a 3,600 square mile area" .... The Judgment below does no such thing.

(Citations omitted; emphasis in italics in original; emphasis in bold added.)

Agreeing with the Sierra Club, our court dismissed the appeal in August 1993. *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir. 1993). Our court recognized that

> [t]he appellants allege numerous injuries from the district court's judgment f but we decide that the judgment and findings are of no consequence to them.- On its face, the judgment orders nothing of the appellants. Nor will the judgment affect the appellants in any future litigation, because the only issue necessarily decided by the district court is that [the] FWS has a nondiscretionary duty to promulgate springflow information. The appellants cannot legitimately blame the judgment for causing any future litigation; the information ordered by the district court is in no wise a prerequisite to ESA-enforcement litigation.

Id. at 575 (emphasis in original).

In November 1993, nearly a year after the bench trial, and several months after entry of judgment, the Sierra Club moved for appointment of an expert (a "monitored") to aid the court in determining whether any state or federal plan complied with the ESA, and, if not, what action the district court should take. Relying upon its "inherent equitable power to appoint a person ... to assist it in administering a remedy", *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir.), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983), the court designated a monitor (Monitor Order).

After appealing the Monitor Order, the State of Texas, on behalf of the Texas Department of Agriculture (TDA), moved the district court to stay the monitor's activities, citing, *inter alia*, the assessment of costs for the monitor. In response, Sierra Club moved to dismiss the TDA; and the district court

did so (TDA Dismissal Order). The TDA Dismissal Order is also on appeal.

Sierra Club sought to amend its complaint to seek relief from the State of Texas in April 1995. Although the district court granted leave to amend, our court, by writ of mandamus, overturned that grant. Later, the Sierra Club moved our court to remand the case conditionally to allow them to again broaden the scope of this litigation.

Much of the post-judgment complication arose out of the troubled birth of a state regulatory entity, the Edwards Aquifer Authority. The Texas legislature created the EAA in 1993 and charged it with regulating withdrawals of water from the aquifer, as well as developing a comprehensive management plan for it. But, because the creation of the EAA implicated section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, Texas was obligated to obtain federal approval of the EAA. It was not obtained until after the July 1995 oral argument in this appeal; this court was notified that the EAA would begin operation in late August 1995.

However, preclearance was not the sole obstacle for the EAA. A water conservation district sought injunctive relief in state court to prevent the EAA from operating, as well as a declaration that the legislation creating the EAA violated the Texas Constitution. After imposing a temporary injunction that allowed the interim directors to be sworn in, to meet, and to defend themselves, ***but not*** to take any action in furtherance of their legislative mandate to regulate draws from the Edwards, the state court in late November 1995 declared that the statute creating the EAA violated the Texas Constitution. The Texas Supreme Court has slated oral argument for early March 1996.

Dropping back to October 1995, our court, anticipating that the EAA would become operational and conduct regulatory activities capable of mooting this appeal, stayed this case and remanded for findings on justiciability. After the district court made such findings, the Sierra Club moved this court to lift the stay, so that the district court's proposed order, prepared

concomitantly with its additional findings, could take effect. (That order, among other things, would have required the federal defendants to demonstrate to the district court that the FWS had "implement[ed] that recovery plan to the point at which reasonable assurance [was] provided that springflows will never again drop below jeopardy levels.") This motion and the numerous other pending motions in our court are rendered moot by this opinion.

On February 14, 1996, the FWS published the long-awaited recovery plan.[3] It includes findings by the FWS on the minimum springflow levels needed to avoid takes under the ESA. (As noted, the lack of this information was the alleged cause of Sierra Club's injury. *Sierra Club v. Babbitt,* 995 F.2d .at 574 n.5.) The plan also addresses maintaining sufficient water in the habitat. Notice of the plan is to be published in the Federal Register.

II.

At issue are: (1) the district court's authority to appoint the monitor; (2) the assessment of part of the monitor's costs against the State of Texas; and, (3) the dismissal of the TDA. In sum, we hold that: (1) the post-judgment complications, especially the confusion over the EAA, more than justified the appointment; (2) the assessment of part of his costs against

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[3] The plan's publication was delayed by, *inter alia*, the government closing occasioned by the budget debate impasse of December 1995. Moreover, budgetary constraints have further impeded this process in that another agency within the Department of Interior, the National Biological Service, has proposed to close the San Marcos National Fish Hatchery and Technology Center. The hatchery has conducted research for many years concerning the species at issue and has been used as a refugium to maintain captive stocks of those species during drought times. Complicating matters, the Sierra Club sent the NBS notice of intent to sue under the ESA if the hatchery were closed. These matters had to be considered by the personnel responsible for preparing the recovery plan. (In fact, the Sierra Club filed such an action on February 13, 1996, and the district court has issued a temporary restraining order preventing the hatchery's closure.)

Texas, which sought to participate in preparation of a recovery plan, was proper; and (3) the dismissal of TDA, whether proper or not, is no longer a live controversy because, with the completion and notice of the federal recovery plan, the requested relief has been achieved.

A.

As a preliminary matter, we note that we have appellate jurisdiction over the Monitor and TDA Dismissal Orders. "To be appealable, an order must be final, it must fall within the specific class of interlocutory orders made appealable by statute, or it must fall within some jurisprudential exception." *Lakedreams v. Taylor,* 932 F.2d 1103, 1107 (5th Cir. 1991) (footnotes omitted).

1.

In *Catlin v. United States,* 324 U.S. 229 (1945), the Supreme Court defined "final decision" for purposes of appeal as "generally ... one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment". *Id.* at 233. When appeals are taken from post-judgment orders, however, appellate courts encounter a dilemma in determining whether the order being appealed is "final".

Combining the related concepts of practical finality[4] and the collateral order doctrine[5], our court, in *United States v. McWhirter,* 376 F.2d 102 (5th Cir. 1967), recognized that the Supreme Court

> has held final and appealable ancillary orders which determine substantial rights of the parties which, if not promptly reviewed, will subject

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[4] *See generally, Blossom v. Milwaukee & C.R.R.*, 68 U.S. 655 (1864) (establishing doctrine of practical finality in postjudgment context).

[5] *See generally, Cohen v. Beneficial Indus. Loan Corp,* 337 U.S. 541 (1941).

> the party to irreparable harm. In such a situation, review postponed amounts to review denied.

Id. at 105 (citations omitted). The Monitor Order fits this category.

For reaching this conclusion, it is necessary to examine the scope of that post-judgment order. In granting the Sierra Club's motion for the appointment of the monitor, the district court stated that the monitor's purpose would be to aid it

> in determining whether further relief from this Court is necessary to "avoid unlawful takings of listed species, any appreciable reduction in the likelihood of survival and recovery of listed species in the wild, and any appreciable diminution of the value of critical habitat for the survival and recovery of any listed species" caused by inadequate regulation of withdrawals from the Edwards Aquifer.

In the Monitor Order, the district court authorized the monitor to gather and analyze information regarding a wide range of matters that may affect the aquifer, as well as to monitor, on a continuing basis, *inter alia*, the efforts of the State of Texas to regulate withdrawals from it. Additionally, the district court ordered the Texas Natural Resources Conservation Commission to "correct" the plan that its predecessor had submitted previously. The order directed the monitor to inform the court if any party "fails or refuses to cooperate fully". Finally, the order remains in effect until "such time as the State of Texas implements an adequate regulatory plan or system to prevent violations of the ESA or until such other time as the Court deems proper, whichever comes first".

But, as the Sierra Club stated in the earlier appeal, the final judgment was of narrow scope and breadth, and did not involve the State of Texas. On the other hand, the Monitor Order exposes the action or inaction of the State of Texas to supervision by a court-appointed official. Thus, the order has the potential to affect substantial rights of the State. We conclude that we possess appellate jurisdiction.

2.

As for appeal from the TDA Dismissal Order, it is well-established in our circuit that the denial of a motion to intervene of right is appealable immediately as a collateral order. *E.g.*, *Valley Ranch Dev. Co. v. Federal Deposit Ins. Corp.*, 960 F.2d 550, 555-56 (5th Cir. 1992); *Bush v. Viterna*, 740 F.2d 350, 351 n.1 (5th Cir. 1984). The district court's dismissal of the TDA, which had been granted intervention of right, operates effectively as a denial of such intervention. Accordingly, we have appellate jurisdiction over that order as well.

B.

The post-judgment developments in this case are made more complex by the presence of Texas as a party. Because it sought to be included in the remedy, when it sought to be ordered to develop its own plan for management of the Edwards, and then embarked on an arduous journey to create a regulatory entity, the district court cannot be faulted for appointing an expert to assist in effectuating the judgment. The confusion created by the parallel efforts of the State's legislative action and the Sierra Club's efforts to enforce the judgment more than justified the appointment of a monitor.

As stated, our court, in *Ruiz v. Estelle*, 679 F.2d at 1161, noted the long-established power of federal courts to appoint an agent to supervise the implementation of decrees. In view of the post-judgment events at play, the appointment of a monitor did not exceed the district court's power.

C.

Texas complains that it cannot be held responsible for part of the cost of enforcing the judgment, when it ordered nothing of Texas. We hold otherwise; because Texas injected itself into the remedial process by asking to participate in the creation of its own plan for management of the Edwards, it may be held responsible for bearing a portion of the cost of the monitor.

D.

Whether TDA should have remained a party in an action that is complete and in which no relief affects TDA simply does not constitute a justifiable controversy. When it opposed the Texas appeal of the amended judgment, the Sierra Club defined the scope of the relief it sought and was granted by that judgment. Because that relief has now been obtained, as discussed below, there can be no controversy regarding whether TDA should be a party to this suit which has concluded in a manner that does not affect TDA.

After the Sierra Club amended its complaint, the defendants moved to dismiss. In response, the Sierra Club stated the limited scope of this action:

> The relief sought by the Plaintiffs in this case is really quite narrow. All Plaintiffs are seeking from this court is an order compelling the FWS to determine the biological requirements of the species within a reasonable time and to notify other interested parties of these requirements.

And, in response to the federal defendants' motion to dismiss the original complaint, the Sierra Club defined once again the limited scope of this action, declaring that

> the Sierra Club and GBRA [Guadalupe-Blanco River Authority] have deliberately sued only the Federal Defendants, and at this time seek only:

> (1) findings of fact concerning the minimum springflows required to prevent takings under [the] ESA ...; and
>
> (2) an order directing the Federal Defendants to develop and implement a plan "for the conservation and survival" of the endangered species at Comal and San Marcos Springs, under [the] ESA....

Then, as discussed, the Sierra Club further limited its articulation of the relief sought by advising our court, in its motion to dismiss the appeal of the intervenor defendants, that this action had proceeded to trial on the "modest request" that the federal defendants be ordered to determine minimum springflows.

With publication of the recovery plan, the FWS has announced those springflow levels required to avoid takes under the ESA in a comprehensive plan for the conservation and survival of the species in issue. Thus, all relief sought, all that could be awarded, has been obtained through this plan.

While the judgment did order the federal defendants to "implement" the recovery plan once it was created, we conclude that "implement", in the context of this action, means simply the publication and notice of the plan. Both our understanding of the ESA and Sierra Club's assertions regarding the scope of the relief it sought support this conclusion.[6] The recovery plan is consistent with our

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[6] We note that some uncertainty exists regarding the ESA's requirement that recovery plans be implemented. *See* Daniel J. Rohlf, The Endangered Species Act: A Guide to Its Protections and Implementation, 89 (1989) (noting courts have yet to interpret whether duty to implement recovery plans includes duty that Secretary must undertake activities identified in plans to conserve species). *See also* Barbara Craig, "The Federal Endangered Species Act", 38 OCT Advocate (Idaho), 12 (1994) (explaining that recovery plans are simply proposals and recommendations lacking force of *law).*

conclusion; its "implementation schedule" provides that the plan does not commit any party to "actually carry out a particular recovery task or expend the estimated funds".

If the Sierra Club wants additional relief, then it must file a new action. No amount of post-judgment paper generation can convert a judgment ordering federal defendants to create and disseminate information into a judgment enjoining Texas to restrict pumping from the Edwards. In short, the Sierra Club is stuck with the limited relief that, in the earlier appeal, it told this court it sought. If "implement" meant more, then Sierra Club should not have told this court, in that earlier appeal, that it meant only the creation and dissemination of information. This action is *over*.

III.

For the reasons discussed above, the order appointing the monitor and assessing his costs is **AFFIRMED**. Because we hold that, with the publication and notice of the recovery plan, this action became devoid of any live controversy, we **REMAND** with instructions that the district court take the ministerial steps necessary to conclude this case promptly.

AFFIRMED and REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB, Plaintiff, GUADALUPE-BLANCO RIVER AUTHORITY, ET AL., Plaintiff-Intervenors,	)	
v.	)	MO-91-CA-069
BRUCE BABBITT, In His Official Capacity as Secretary, Department of Interior, and THE UNITED STATES FISH AND WILDLIFE SERVICE, Defendants,	)	
DANNY McFADIN, TOMMY WALTER, CARL MUECKE, ET AL., Defendant-Intervenors.	)	

ORDER APPOINTING JOE G. MOORE, JR. AS MONITOR

IN ACCORDANCE WITH THIS COURT'S PREVIOUS ORDER of December 10, 1993, granting Plaintiff SIERRA CLUB's Motion to Appoint a Monitor, the Court herewith appoints Mr. Joe G. Moore, Jr. as Monitor in the above-captioned cause of action.

Plaintiff's Motion requested the appointment of a monitor to gather, summarize, and evaluate information necessary to allow the Court to take appropriate action to prevent violations of the Endangered Species Act ("ESA").[7] The

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[7] This Court has previously ruled the Federal Defendants violated the Endangered Species Act and the Plaintiffs had met their burden of proving the

Federal Defendants oppose the appointment of a Monitor, maintaining that the attorneys in this litigation and State officials are and should be responsible for gathering, summarizing, and evaluating any information which may be needed in the future by the Court. Defendant-Intervenors Texas Natural Resource Conservation Commission ("TNRCC")[8] and the Texas Department of Parks and Wildlife ("TPWD") also oppose the appointment of a monitor and, in the alternative, suggest designation of the TNRCC as monitor. Plaintiff-Intervenors City of New Braunfels and New Braunfels Utilities support the concept of the appointment of a monitor. The City of San Antonio, State of Texas/Texas Department of Agriculture, Danny McFadin, Tommy Walker, Carl Muecke, Jr., United Services Automobile Association, Redland Stone Products Company, Southwest Research Institute, USAA Real Estate Company, Southwest Foundation for Biomedical Research, and the Greater San Antonio

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necessary facts in order to obtain injunctive relief under the ESA. *See* Amended Findings of Fact and Conclusions of Law at 74. In addition, the Court granted Plaintiff and Plaintiff-Intervenors leave to "seek appropriate relief from this Court at any time *after* May 31, 1993 . . . *if the State of Texas does not have in effect at such time,* pursuant to new or existing State law, a regulatory system pursuant to which withdrawals from the Edwards Aquifer can and will be limited to whatever extent may be required to avoid unlawful takings of listed species, jeopardy to any listed species, and destruction or adverse modification of critical habitat of any listed species, even in a repeat of the drought of record." *See,* Amended Judgment at 6 (emphasis in original).

One year after the original Judgment and Findings of Fact and Conclusions of Law were entered in this case, the State of Texas still does not have in effect a regulatory system for the Edwards Aquifer, and the City of San Antonio has failed to develop any water supplies from sources other than the Edwards Aquifer.

[8] The TNRCC is successor to the Texas Water Commission.

Builders Association (collectively, the "Defendant-Intervenors") jointly oppose the appointment of a monitor and urge, once again, that this Court "discontinue its involvement in the management of the Edwards Aquifer . . ."

The Court finds there is no plan in effect by any Federal, state, or local governmental entity that adequately protects against violations of the ESA caused by unregulated pumping from the Edwards Aquifer. The Court further finds additional remedial relief may be necessary in order to prevent future violations of the ESA caused by unregulated pumping from the Edwards Aquifer. The Court finds the volume and complexity of the information, documentation, and knowledge required to develop additional adequate remedies, should they be required, compels the appointment of a monitor to assist the court in gathering, summarizing, and evaluating the information and documentation necessary for possible future remedial actions.

Having reviewed the history of this litigation, the relevant law, the posture of the State's efforts to prevent ESA violations in the Edwards Aquifer through State regulation, the positions of the various parties on the appointment of a monitor and the identity of the monitor, and the qualification of Mr. Joe G. Moore, Jr. to act as monitor in this case, it is the opinion of this Court the following Orders are appropriate:

IT IS ORDERED Mr. Joe G. Moore, Jr. is hereby appointed as Monitor in the above-captioned cause to advise the Court on the necessity and implementation of additional remedial actions which may become necessary in the above-captioned cause of action.[9] Mr. Moore shall begin his duties

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[9] This Court has "inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy. *Ruiz v. Steele*, 679 F.2d 1115, 1161, *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

as Monitor on April 1, 1994. As Monitor, Mr. Moore shall have the following duties:

(1) On a continuing basis, gather and analyze whatever information may be available concerning current and projected withdrawals from the Aquifer, recharge to the Aquifer, Aquifer levels and springflow levels. File with the court and all parties Monthly Reports summarizing that information.

(2) On a continuing basis, monitor the activities of the State of Texas relating to regulation of withdrawals of water from the Edwards Aquifer. Summarize in the Monthly Reports any activity or lack of activity that may be significant.

(3) On a continuing basis, gather and analyze plans that may be developed or proposed to reduce or limit withdrawals from the Aquifer by any means including, without limitation, drought management, conservation, withdrawal limitations imposed pursuant to an enforceable permit system, and withdrawal limitations imposed as a condition of federal funding. Summarize in the Monthly Reports the expected impact of each plan on withdrawals and springflows, and evaluate the extent to which such plan assures, or fails to assure, that the Comal Springs and San Marcos Springs will not drop below take and jeopardy levels, as defined by USFWS, even in a repeat of the drought of record.

(4) On a continuing basis, monitor the efforts of users of water from the Aquifer to conserve water, reuse water and use water currently available from other sources. (This does not contemplate the disclosure by any party or nonparty of information which might jeopardize ongoing negotiations.) Summarize in the Monthly Reports any activity or lack of activity that may be significant.

(5) On a continuing basis, gather and analyze whatever information may be already available concerning the extent to which Federal agencies are authorizing, funding, or carrying

out (a) withdrawals from the Edwards Aquifer or (b) other actions that are likely to affect withdrawals. Summarize such information in the Monthly Report, addressing the impact on withdrawals of each Federal agency individually and all Federal agencies in the aggregate, and the extent to which such agencies are engaged in formal consultation with USFWS concerning such impacts.

(6) On a continuing basis, gather and analyze whatever information may be available concerning new wells drilled in the Aquifer, new connections made to any system that supplies water from the Aquifer, and increases in the amounts of water withdrawn by or supplied to any user since June 15, 1989, the date the first Notice of Violations was given in this case. Summarize such information in the Monthly Reports and, to the extent possible, specifically identify such new wells, new connections, and increases in use; the date or dates that such new wells were drilled and such new connections and increases in use were made; and the date or dates that the well owner, water supplier, or user first received actual or constructive notice of any of the Notices of Violation, this case, or the Court's February 1, 1993 original Judgment in this case

Nothing in the above list of duties shall be construed as granting the Monitor any authority to enter orders or make determinations on behalf of the Court. At the suggestion of the Monitor or any party, or on the Court's own motion, after opportunity to comment by all parties, the Court may add to or otherwise modify the duties of the Monitor.

IT IS FURTHER ORDERED the cost of compensating the Monitor shall be borne by the Federal Defendants and the Defendant-Intervenors the STATE OF TEXAS and the CITY OF SAN ANTONIO. Absent an agreement on the cost-sharing by the parties, the Federal Defendants and the Defendant-Intervenors the STATE OF TEXAS and the CITY OF SAN ANTONIO shall bear an equal share of the approved costs of the Monitor.

IT IS FURTHER ORDERED the Monitor shall be compensated at a rate of $125.00 per hour. The Monitor shall also be compensated for all reasonable expenses incurred in the performance of his duties, including reasonable secretarial, communication, and travel expenses. The Monitor shall keep daily time records of the work performed and expenses incurred in the performance of his duties as Monitor, and shall submit a Monthly Statement of Fees and Expenses to the Court on or about the first day of the each month. Within three (3) days of receipt of the Monitor's Monthly Statement of Fees and Expenses, the Court shall enter an Order Approving Fees and Expenses of the Monitor directing the Federal Defendants and the Defendant-Intervenors the STATE OF TEXAS and the CITY OF SAN ANTONIO to pay the approved fees and expenses of the Monitor. Payment shall be made by the parties directly to the Monitor within ten (10) days of the entry date of the Order Approving Fees and Expenses of the Monitor.

IT IS FURTHER ORDERED the Monitor may meet or communicate with any party or non-party, or any expert or other representative of any party or non-party, individually, and may request and receive data, analyses, suggestions, drafts, and other information from Order Appointing Joe A. Moore, Jr. as Monitor that party, non-party, or representative. All actions of the Monitor are subject to public disclosure. The Monthly Report shall reflect all communications with any party or non-party, or any expert or other representative of any party or non-party. The Monitor shall provide a copy of any written communication with any party or non-party, or any expert or other representative of any party or non-party, concerning the subject matter of this Order at the requesting party's expense.

IT IS FURTHER ORDERED all parties and non-parties and their representatives are strongly urged to cooperate fully with the Monitor so the Monitor can perform his duties to the best of his abilities, as efficiently as possible, and at the

lowest possible cost. In this regard, the Court notes both the TNRCC and the Edwards Underground Water District ("EUWD"), in their pleadings and presentations to the Court, have offered their substantial resources and expertise to assist the Court at their own cost. The Court also understands counsel for Federal Defendants has made similar offers on behalf of the United States Geological Survey ("USGS"), an agency within the Department of the Interior. Accordingly, the TNRCC, EUWD and USGS are strongly urged to follow through on their offers and provide substantial assistance to the Monitor by making available necessary personnel and adequate resources to allow those personnel to respond promptly and thoroughly to the Monitor's requests. The Monitor may request such assistance from particular individuals within each agency, and the Order Appointing Joe G. Moore, Jr. as Monitor TNRCC, EUWD, and USGS are strongly urged to accommodate these requests if at all possible.

IT IS FURTHER ORDERED the City of San Antonio, in particular, is strongly urged to cooperate fully with the Monitor. The Court further strongly urges the City to take all actions necessary so that the City will be able to supply to its citizens and other water customers the substantial amounts of water currently available from sources other than the Edwards Aquifer at the earliest possible date. The City is strongly urged to plan to reduce significantly, at the earliest possible date, its withdrawals from the Aquifer, particularly during droughts, with minimal adverse consequences on human economic activities.

IT IS FURTHER ORDERED the TNRCC is strongly urged to do the following:

(1) correct the March 1, 1993 plan prepared by its predecessor, the TWC, to show which withdrawals the TNRCC would limit, and to what extent and under what conditions they would be limited, to assure that the Comal

Springs and San Marcos Springs will not drop below jeopardy levels, as defined by the USFWS, at any time, even in a repeat of the drought of record. In preparing the corrected plan, the TNRCC should assume that the repeat of the drought of record has already begun some time prior to the date the corrected plan is submitted to the Court, or that it will begin immediately thereafter. In preparing the corrected plan, the TNRCC should attempt to minimize overall adverse economic impacts in the region;

(2) submit the corrected plan to the Monitor and the parties by April 1, 1994; and

(3) take all appropriate steps so that, by April 1, 1994, TNRCC will be as prepared as possible under the circumstances to initiate or help initiate implementation of an adequate plan at any time on or after that date, if it should become necessary.

IT IS FURTHER ORDERED the Monitor shall advise the Court if any party, non-party, or representative fails or refuses to cooperate fully with the Monitor. The Monitor shall respect the privileges and protections granted to the parties under the Federal Rules of Civil Procedure and the U.S. Constitution. In the event of perceived violations of these protections, any party may request a protective order from the Court. Nothing in this Order should be construed as requiring any party, non-party, or representative to provide any information or assistance to the Monitor, or to take any other action.

IT IS FURTHER ORDERED all suppliers and users of water from the Aquifer are strongly urged to take all actions necessary to eliminate the waste of water and conserve water to the maximum extent possible, as quickly as possible.

IT IS FURTHER ORDERED this Order shall remain in full force and effect until such time as the State of Texas implements an adequate regulatory plan or system to prevent violations of the ESA or until such other time as the Court deems proper, whichever comes first.

IT IS FINALLY ORDERED a hearing in the above-captioned cause of action is scheduled for April 15, 1994 at 1:00 p.m., in Midland, Texas, to address the following issues:

(1) any additional relief sought by Plaintiff and Plaintiff-Intervenors under Federal law because of inadequacy of State law or because of inadequacy of the State's implementation under that law;

(2) the status of review by the Texas courts of the efforts of the TNRCC to regulate withdrawals from the Edwards Aquifer based on that agency's determination that the water is owned by the State in trust for the benefit of the public;

(3) new State laws, if any, relative to the Edwards Aquifer;

(4) the status of applications for new listings of other species that rely upon springflows from the Comal or San Marcos Springs, or that live underground in the Edwards Aquifer; and

(5) the status of USFWS' efforts to define, and then refine, the Comal and San Marcos minimum springflows, and the Edwards Aquifer minimum levels, required for the conservation and survival of listed species.

Should any party have additional matters to address, they shall submit requests to have these matters added to the agenda for discussion no later than twenty (20) days prior to the date of the hearing.

SIGNED this *25th* day of February, 1994.

/s/

HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .

United States Constitution, Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .

16 U.S.C. § 1540

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf —

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or ...

No. 96-3

(2)

Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

STATE OF TEXAS,

Petitioner,

vs.

SIERRA CLUB, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Did the State of Texas waive Eleventh Amendment immunity when it voluntarily intervened and played a central adversarial role in federal proceedings?

2. Does the Eleventh Amendment prohibit a federal district court from assessing monitor's costs against a State agency party?

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INTRODUCTION

Unregulated pumping from the Edwards Aquifer endangers certain species that live in springs fed by the Aquifer. In 1991 the Sierra Club sued federal defendants under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq. (1973), to force a federal recovery plan for the species. Two Texas State agencies moved to intervene as plaintiff-intervenors. The State agencies sought a central role in the development of a joint State-federal plan for regulation of the Edwards.

In 1993 the district court ordered limited relief against the federal defendants and one of the State intervenors. The court provided that the State should be given an opportunity to develop and implement an adequate State plan before the court considered more drastic relief. In response, the Texas legislature created a new State agency to regulate the Edwards. But an unrelated challenge to the new entity threw the State's role into confusion for several years. Early in 1994, the district court appointed a monitor to advise concerning potential post-judgment relief and assessed the State intervenors one-third of the costs of the monitor. More than a year later, the State agencies appealed the order appointing the monitor and assessing costs. The court of appeals affirmed. The State of Texas has abandoned its challenge to the appointment of the monitor. Texas petitions for certiorari concerning the monitor's costs, claiming Eleventh Amendment immunity.

Assessing a portion of the monitor's costs to the State parties was entirely proper for two distinct reasons. The State agencies waived sovereign immunity by voluntarily

intervening, seeking and obtaining a central role in the federal proceedings. Moreover, this Court has repeatedly held that the assessment of costs against a State that is a party in federal court does not violate the Eleventh Amendment.

OPINIONS BELOW

In addition to the opinions below that the State of Texas provides as appendices, the following are pertinent:

The District Court for the Western District of Texas' May 26, 1993 Amended Judgment (Respondent's Appendix A), ordering relief against the federal defendants and one of the State intervenors, and reserving plaintiffs' right to seek additional post-judgment relief if the State did not have an adequate plan in place by May 31, 1993.

The District Court's first Order on Motion for Additional Relief (June 6, 1994) (Respondent's Appendix B), giving the monitor emergency planning duties and requiring the federal defendants to proceed with recovery planning.

The District Court's Order Directing the Monitor to Create a Panel (Sept. 30, 1994) (Respondent's Appendix C), directing the monitor to work with the parties and with other appropriate State and federal officials in an effort to "mediate and resolve" post-judgment issues "and avoid further Court intervention."

STATEMENT OF THE CASE

Proceedings Below

Certain species living in the Edwards Aquifer and in two Edwards-fed springs are endangered by excessive pumping. The Sierra Club sued the Secretary of the Interior and the United States Fish & Wildlife Service ("USFWS") in 1991 for failure to develop and implement an adequate recovery plan for the Edwards-dependent species under ESA Section 4. The Texas Water Commission ("TWC") and the Texas Parks and Wildlife Department sought intervention as plaintiff-intervenors. These State agencies asked for affirmative relief: that the federal defendants be ordered "to develop and implement a comprehensive plan, in cooperation with the [two state agencies] as lead agencies," to regulate Edwards pumping. Record Excerpt 10, State of Texas' Motion to Intervene at 32. The district court realigned them as defendant-intervenors, along with a third State agency, the Texas Department of Agriculture. R. 1406-1411, 1696-97.

The district court found that the threat to the Edwards-dependent species was caused by excessive pumping unregulated by the State. Findings Nos. 24-26, 28, 37, 39, 97, *Sierra Club v. Lujan*, 1993 WL 151353 (W.D. Tex. 1993). The district court ordered the federal defendants to determine minimum spring flows; ordered the lead state agency to develop and file with the court an adequate regulatory plan; and deferred ruling on additional relief until after May 31, 1993, in hopes that the Texas legislature would provide for adequate state regulation. Respondent's App. A4-5. The federal defendants determined minimum spring flows, the state filed a plan,

the Texas legislature passed a statute creating an Edwards Aquifer Authority ("EAA"), and the court of appeals dismissed the appeals of the defendant-intervenors. *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir. 1993).

The EAA, however, was unable to begin regulating Edwards pumping because of a challenge under the federal Voting Rights Act. *See Texas v. United States*, 866 F. Supp. 20 (D.D.C. 1994). As it became clear in late 1993 that the Voting Rights Act challenge was serious, the district court appointed a monitor to advise on the potential need for additional relief under the ESA. Petitioner's App. E1. The State agencies opposed the appointment of a monitor as premature and, in the alternative, urged that the Texas Natural Resources Conservation Commission (successor to the TWC) be appointed. R. 4730-4738.

The court allocated the costs of the monitor one-third to the federal defendants, one-third to the State defendant-intervenors, and one-third to the largest pumper-intervenor, the City of San Antonio. Petitioner's App. E5. All appealed, but dismissed their appeals on September 29, 1994 without prejudice to reinstatement in 180 days.

The district court directed the monitor to prepare an emergency withdrawal reduction plan for potential use in the summer of 1994. Respondent's App. B2. The court later ordered the monitor to lead a joint State-federal effort to "mediate and resolve" a voluntary settlement of the underlying issues without the need for further court intervention. Respondent's App. C2. The district court also ordered the federal defendants to proceed with a revised recovery plan. No one appealed these orders.

In March 1995 the State defendant-intervenors reinstated their appeals of the order appointing the monitor and charging them with a portion of his costs, and moved for a stay of the monitor's activities. The court of appeals refused their request for an order stopping all activities of the monitor and the district court, but allowed the State parties to pay their one-third share into the registry of the district court, pending their appeal.

To cure the Voting Rights Act deficiency the Texas legislature in its 1995 session amended the EAA's statute. Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Sess. Law Serv. 2505, *amending* Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2353. Before the EAA could begin operations in the summer of 1995, a Texas state district court enjoined it on state constitutional grounds. As drought conditions worsened in the region, the Sierra Club sought additional post-judgment relief against the federal defendants under the ESA, including a January 1, 1996 deadline for completion of an adequate federal recovery plan. On October 18, 1995, the court of appeals ordered the district court to evaluate whether abstention was appropriate and stayed further activities of the monitor. Petitioner's App. C6. In an order dated November 29, 1995, the district court concluded that abstention was not appropriate.

In February 1996, the federal defendants finally published their recovery plan. The court of appeals immediately affirmed the district court's appointment of the monitor:

> Because [Texas] sought to be included in the remedy, when it sought to be ordered to develop its own plan for management of the Edwards,

> and then embarked on an arduous journey to create a regulatory entity, the district court cannot be faulted for appointing an expert to assist in effectuating the judgment.

Petitioner's App. D10.

The court of appeals likewise affirmed the district court's order holding Texas responsible for part of the costs of enforcing the judgment:

> " . . . because Texas injected itself into the remedial process by asking to participate in the creation of its own plan for management of the Edwards, it may be held responsible for bearing a portion of the cost of the monitor."

Id. at D11.

The court of appeals also concluded that the publication of the recovery plan gave the Sierra Club "all relief sought, all that could be awarded" in this case, *id.* at D12, and that the Club would have to seek any additional relief in a new suit. *Id.* at D13. The court of appeals therefore remanded "with instructions that the district court take the ministerial steps necessary to conclude this case promptly." *Id.* The court of appeals then denied the State's petition for rehearing and for stay pending petition for certiorari. When the circuit justice also denied stay, the district court on May 1, 1996 ordered payment from its registry to the monitor of the remaining balance and, on May 17, 1996, concluded the case below.

Since then, the springs have fallen far below the levels at which the continued existence of the Edwards-dependent species is jeopardized. In the continued absence of any state response, the Sierra Club filed a new

suit under Section 9 of the ESA, seeking court-ordered pumping restrictions. On June 28, 1996, the Texas Supreme Court affirmed the constitutionality of the EAA statute, 9-0. The district court has deferred action in the new ESA suit pending an opportunity for the EAA to take appropriate emergency action.

TEXAS' PETITION FOR CERTIORARI LACKS MERIT

The State of Texas no longer challenges the appointment of the monitor. It now challenges only the district court's order assessing to the State parties one-third of the monitor's costs. The State claims that such assessment violates the Eleventh Amendment. The State's Eleventh Amendment claim is frivolous for two distinct and independent reasons.

First, the State voluntarily intervened in this lawsuit, deliberately seeking to play a central role in the attempt to develop plans for the Edwards Aquifer. This Court long ago adopted the common-sense rule that a State may voluntarily waive its Eleventh Amendment immunity and does so when it accedes to federal jurisdiction by intervening in a federal proceeding.

The seminal case is *Clark v. Bernard*, 108 U.S. 436, 447, 2 S.Ct. 878, 883 (1883), in which the State of Rhode Island intervened in a federal proceeding as claimant of a bond held by a bankruptcy estate. When the court attempted to adjudicate the rights of Rhode Island in the bankruptcy proceeding, the State argued that any such adjudication would violate the Eleventh Amendment. This Court dismissed Rhode Island's argument as follows:

> The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction.

The common-sense rule articulated in *Clark v. Bernard* has never been seriously questioned. This Court cited that rule with approval in *Atascadero State Hosp. v. Scanlan*, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145 (1985), as an example of the circumstances under which a State waives its Eleventh Amendment rights.

This Court's recent opinion in *Seminole Tribe v. Florida*, 116 S.Ct. 1114 (1996), on which the State primarily relies, casts no doubt on this conclusion. That case involved a State as an *unwilling* defendant in federal court, a point the Chief Justice, in his opinion for the majority, repeatedly emphasized:

> For over a century we have reaffirmed that federal jurisdiction over suits against *unconsenting* States "was not contemplated by the Constitution when establishing the judicial power of the United States." Here, petitioner has sued the State of Florida and it is undisputed that Florida has *not consented* to the suit.

Id. at 1122-23 (citations omitted, emphasis added). The Chief Justice went on to distinguish another case by pointing out that it involved "the unremarkable, and

completely unrelated, proposition that the States may waive their sovereign immunity." *Id.* at 1128.

Second, and equally dispositive of the State's constitutional claims, this Court has repeatedly ruled that the assessment of litigation *costs* against a State in federal court does not violate the Eleventh Amendment. In *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978), this Court summarized the rule as follows:

> Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court. *See Missouri v. Iowa*, 7 How. 660, 681, 12 L.Ed. 861, 870; *North Dakota v. Minnesota*, 263 U.S. 583, 44 S.Ct. 208, 68 L.Ed. 461 (collecting cases). The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.
>
> In *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168, the State challenged this Court's award of costs, but we squarely rejected the State's claim of immunity. . . . A federal court's interest in orderly, expeditious proceedings "justifies [it] in treating the state just as any other litigant, and in imposing costs upon it" when an award is called for. *Id.*, at 77, 48 S.Ct., at 100.

437 at 695-96, 98 S.Ct. at 2576.

The rule applied in *Hutto v. Finney* was reaffirmed in *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 109 S.Ct. 2463 (1989). In that case this Court held that interest assessed against a State for delay in paying attorneys' fees did not violate the Eleventh Amendment. The three justices who

dissented in *Missouri v. Jenkins by Agyei* accepted the rule that the assessment of costs against a State did not violate the Eleventh Amendment but believed that the interest at issue constituted damages rather than costs. There can be no doubt that the costs associated with a court-appointed monitor constitute costs as opposed to damages for past conduct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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August 1, 1996

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APPENDIX A

Excerpts from the District Court
for the Western District of Texas'
May 26, 1993 Amended Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB,	§	
Plaintiff,	§	
GUADALUPE-BLANCO RIVER AUTHORITY, ET AL.,	§	
Plaintiff-Intervenors,	§	MO-91-CA-069
V.	§	
BRUCE BABBITT, in his official capacity as Secretary, Department of Interior, and THE UNITED STATES FISH AND WILDLIFE SERVICE,	§	
Defendants,	§	
DANNY McFADIN, TOMMY WALKER, CARL MUECKE, ET AL.,	§	
Defendant-Intervenors.	§	

AMENDED JUDGMENT

On February 1, 1993, this Court filed its Judgment and separate Findings of Fact and Conclusions of Law in the above-captioned cause. On limited remand from the U.S. Court of Appeals for the Fifth Circuit, this Court now has under consideration the Federal Defendants' and Plaintiffs' Joint Motion to Clarify the Judgment and

Findings. This Court finds that such motion is well taken and that it should be GRANTED.

IT IS THEREFORE ORDERED that the Federal Defendants' and Plaintiffs' Joint Motion to Clarify the Judgment and Findings is hereby GRANTED, and the Court's February 1, 1993 Judgment is hereby amended pursuant to Rule 60 of the Federal Rules of Civil Procedure to read as set forth herein.

THIS COURT, by separate Amended Findings of Fact and Conclusions of Law, ruled in favor of Plaintiff and Plaintiff-Intervenors in the above-captioned cause. This Court's rulings properly dispose of Plaintiff's, Plaintiff-Intervenors', Defendants', Defendant-Intervenors', and *Amici Curiae* issues in their entirety. Accordingly, the following Judgment, pursuant to Rule 58 of the Federal Rules of Civil Procedure, is appropriate. Accordingly,

IT IS THEREFORE ORDERED that, in connection with Plaintiffs' allegations of violations by the Federal Defendants of the Endangered Species Act (the "ESA"), the following minimum springflow findings shall serve as *interim* springflow findings for all purposes under the ESA, until the United States Fish and Wildlife Service (the "USFWS") modifies those findings as set forth below:

. . .

IT IS FURTHER ORDERED that the USFWS may at any time modify the *interim* minimum springflow findings, based on available information and in the exercise of its best professional judgment.

IT IS FURTHER ORDERED that the USFWS shall determine within forty-five (45) days of the filing of this

Judgment based on available information and in the exercise of its best professional judgment, each of the following to the extent that it has not yet made such determinations:

(1) the springflow at Comal Springs at which Fountain Darters begin to be "taken" as springflow drops;

(2) the minimum springflow required at Comal Springs to avoid appreciable reduction in the likelihood of survival and recovery of the Fountain Darter in the wild;

(3) the minimum springflow required at San Marcos Springs to avoid appreciable diminution of the value of critical habitat for the survival and recovery of any listed species;

(4) the springflow at San Marcos Springs at which Texas Wildrice begins to be damaged or destroyed as the springflow drops;

(5) the springflow at San Marcos Springs at which any listed wildlife species begins to be "taken" as the springflow drops;

(6) the minimum springflow required at San Marcos Springs to avoid appreciable reduction in the likelihood of survival and recovery of any listed species in the wild;

(7) the minimum springflows or minimum water levels in the Edwards at which Texas Blind Salamanders begin to be "taken" as springflows and water levels drop; and

(8) the minimum springflows or minimum water levels in the Edwards required to

> avoid appreciable reduction in the likelihood of survival and recovery the Texas Blind Salamander in the wild.

. . .

IT IS FURTHER ORDERED that the USFWS shall promptly provide all Federal agencies to which Plaintiff or Plaintiff-Intervenors gave notices of violations (the "Federal Agencies") with a copy of this Judgment, and the USFWS shall further advise all Federal Agencies of each minimum springflow and Edwards Aquifer level determination made by the USFWS, and of any modification made by the USFWS to any such determination or to any interim minimum springflow finding made by this Court, promptly upon the USFWS making that determination or modification, so that those agencies will be able to perform their duties under the ESA *if the State of Texas fails or refuses to regulate withdrawals from the Edwards Aquifer* to whatever extent may be required to avoid jeopardy to, and destruction or adverse modification of critical habitat of, any listed species.

. . .

IT IS THEREFORE ORDERED that Defendant-Intervenor the Texas Water Commission shall prepare a plan that, in its best professional judgment, assures that the Comal Springs and San Marcos Springs will not drop below jeopardy levels as defined by the USFWS, even in a repeat of the drought of record, and it shall submit that plan to the Court and all parties by not later than March 1, 1993.

IT IS FURTHER ORDERED that Plaintiff and Plaintiff-Intervenors may seek appropriate relief from this

Court at any time *after* May 31, 1993 (the last day of the current regular session of the Texas legislature) *if the State of Texas does not have in effect at such time*, pursuant to new or existing State law, a regulatory system pursuant to which withdrawals from the Edwards Aquifer can and will be limited to whatever extent may be required to avoid unlawful takings of listed species, any appreciable reduction in the likelihood of survival and recovery of listed species in the wild, and any appreciable diminution of the value of critical habitat for the survival and recovery of any listed species, even in a repeat of the drought of record.

IT IS FURTHER ORDERED that upon Motion by Plaintiff and Plaintiff-Intervenors and Order by this Court, the parties are put on notice that this matter is tentatively scheduled for further hearing on Monday, June 28, 1993, to address the following issues:

(1) the status of review by the Texas courts of the TWC's efforts to regulate withdrawals from the Edwards Aquifer based on the TWC's determination that the water is owned by the state in trust for the benefit of the public;

(2) new State laws, if any, relative to the Edwards Aquifer;

(3) the status of applications for new listings of other species that rely upon springflows from the Comal or San Marcos Springs, or that live underground in the Edwards Aquifer;

(4) the status of USFWS' efforts to define, and then refine, the Comal and San Marcos

minimum springflows, and the Edwards Aquifer minimum levels, required for the conservation and survival of listed species; and

(5) any additional relief sought by Plaintiff and Plaintiff-Intervenors under Federal law because of inadequacy of state law or because of inadequacy of the State's implementation under that law.

. . .

SIGNED this 26th day of May, 1993.

/S/
HONORABLE
LUCIUS D. BUNTON, III
SENIOR DISTRICT JUDGE

APPENDIX B

Excerpts from the District Court for the Western District of Texas' June 3, 1994 Order on Motion for Additional Relief

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB,	§	
Plaintiff,	§	
GUADALUPE-BLANCO RIVER AUTHORITY, ET AL.,	§	
Plaintiff-Intervenors,	§	MO-91-CA-069
V.	§	
BRUCE BABBITT, in his official capacity as Secretary, Department of Interior, and THE UNITED STATES FISH AND WILDLIFE SERVICE,	§	
Defendants,	§	
DANNY McFADIN, TOMMY WALKER, CARL MUECKE, ET AL.,	§	
Defendant-Intervenors.	§	

ORDER ON MOTION FOR ADDITIONAL RELIEF

BEFORE THIS COURT, is Plaintiff Sierra Club's Motion for Additional Relief requesting that the Court (1) declare a present emergency caused by excessive, unregulated pumping from the Edwards Aquifer; (2) direct the Monitor to prepare emergency plans; and (3) order the

Federal Defendants, Secretary of the Interior Bruce Babbitt and the Fish and Wildlife Service (FWS), to complete mandatory recovery planning. . . . Having reviewed the Motion, the Responses, and Plaintiff's Reply, it is the opinion of the Court Plaintiff's request for declaration of a present emergency should be denied, Plaintiff's request for the preparation by the Monitor of an emergency withdrawal reduction plan should be granted, and Plaintiff's request for an Order directing the Federal Defendants to complete mandatory recovery planning should be granted.

. . .

Preparation of Emergency Plan

The Court believes, however, that previous findings and conclusions reached by the Court support granting Plaintiff's request that the Court direct the Monitor to prepare an emergency withdrawal reduction plan. The Court has previously found violations of § 9 of the Endangered Species Act (ESA) have occurred in the past; there is a likelihood violations will occur in the future in the absence of pumping regulations; there is no plan in effect by any Federal, State, or local governmental entity adequately protecting against violations of the ESA caused by unregulated pumping from the Edwards Aquifer; and additional remedial relief may be necessary in order to prevent future violations of the ESA caused by unregulated pumping from the Aquifer. The Court further finds any future remedial relief ordered by this Court as necessary to prevent violations of federal law will most certainly include court-ordered restrictions on pumping from the Aquifer.

. . .

It should be carefully noted that the Court does not consider ordering the Monitor to prepare an emergency withdrawal reduction plan to be injunctive relief. The Monitor is not a party to this cause of action. As previously stated, this Court has "inherent equitable power to appoint a person, whatever his title, to assist it in administering a remedy." *Ruiz v. Estelle*, 679 F.2d 1115, 1161, *amended in part, vacated in part*, 688 F.2d 266 (5th Cir.), *cert. denied*, 460 U.S. 1042 (1983); Order Appointing Joe G. Moore, Jr. as Monitor at 4. The Court has previously found that "[i]f current levels of withdrawals are allowed to continue without reduction, endangered and threatened species will be taken, damaged, or destroyed; their designated critical habitat destroyed or adversely modified; and their continued existence severely jeopardized during dry periods or relatively mild droughts." Amended Finding 37 (emphasis added). Since there are still no effective restraints on levels of withdrawals from the Aquifer, future violations of the ESA are highly possible. There appears little logic in recognizing an inherent power of the Court to appoint a Monitor to assist in administering a remedy without also recognizing that same power, in unusual circumstances such as these, to appoint a Monitor to advise the Court on the need for and appropriateness of remedies which it is highly possible will be needed in the future. The Court finds that ordering the Monitor to prepare an emergency pumping reduction plan by August 1, 1994, would further the just, speedy, and inexpensive determination of any future

action in which the ultimate relief sought is the regulation of pumping from the Edwards Aquifer. Fed. R. Civ. P. 1.

. . .

A hearing on the need for actual implementation of an emergency plan will not be scheduled until and unless there is filed with the Court an application for injunctive relief requesting imposition of an emergency withdrawal reduction plan. At that time, the parties will be allowed to present evidence on the need for actual implementation of any emergency plan.

Development and Implementation of a Recovery Plan

Finally, the Sierra Club requests the Court order the Federal Defendants to complete their recovery planning. The Court finds this requested additional relief is also supported by the Court's Amended Findings and Conclusions. This Court has previously found that the Federal Defendants failed to implement the existing San Marcos Recovery Plan, and they failed to develop a plan for Comal Springs, thereby neglecting their nondiscretionary duties under § 4(f) of the ESA, 16 U.S.C. § 1533(f). *See* Amended Findings 64-71; *Sierra Club v. Babbitt*, 995 F.2d 571, 574 (5th Cir. 1993). The Federal Defendants do not claim this failure has been remedied and do not claim they no longer have such a duty. It appears, therefore, the Plaintiff's request for an order to the Federal Defendants to comply with their duties under § 4(f) is well taken and should be granted. Notwithstanding the objections of the City of San Antonio and the Federal Defendants, the Court discerns no procedural or legal barriers to granting this requested relief. Accordingly,

IT IS ORDERED the Monitor shall prepare, on or before August 1, 1994, an emergency withdrawal reduction plan adequate to prevent jeopardy at Comal Springs at all times, beginning this summer, even in a repeat of the drought of record.

IT IS FURTHER ORDERED any party who wishes to do so may submit, no later than August 1, 1994, an alternative proposed emergency withdrawal reduction plan.

IT IS FINALLY ORDERED the Secretary and the FWS shall publish a proposed recovery plan or plans for the Texas Blind Salamander and for the Comal Springs populations of Fountain Darters and San Marcos (or other unique) salamanders on or before August 1, 1994. The Secretary and the FWS shall be free to propose separate recovery plans for each such species, or to combine any or all of them with each other and with the revision to the San Marcos Recovery Plan. These recovery plans shall include "(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species; (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of [§ 4 of the ESA, 16 U.S.C. § 1533], that the species be removed from the list; and (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal." 16 U.S.C. § 1533(f)(1)(B). These plans shall include such combinations of pumping restrictions, federal action agency ESA § 7 cutoffs of permits or funds or other actions, and other affirmative measures as appear necessary and appropriate to protect the Aquifer

and the species dependent on the Aquifer, even if a repeat of the drought of record begins now, assuming the continued indefinite absence of an adequate state or regional plan. In the alternative, the Secretary shall file a brief with the Court on or before June 13, 1994, stating that "he finds that such a plan will not promote the conservation of the species" and the specific reasons for that finding. 16 U.S.C. § 1533(f)(1).

SIGNED this 3rd day of June, 1994.

/S/
HONORABLE
LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

APPENDIX C

Excerpts from the District Court for the Western District of Texas' September 30, 1994 Order Directing Monitor to Create a Panel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SIERRA CLUB,	§	
Plaintiff,	§	
GUADALUPE-BLANCO RIVER AUTHORITY, ET AL.,	§	
Plaintiff-Intervenors,	§	MO-91-CA-069
V.	§	
BRUCE BABBITT, in his official capacity as Secretary, Department of Interior, and THE UNITED STATES FISH AND WILDLIFE SERVICE,	§	
Defendants,	§	
DANNY McFADIN, TOMMY WALKER, CARL MUECKE, ET AL.,	§	
Defendant-Intervenors.	§	

ORDER DIRECTING THE MONITOR TO CREATE A PANEL

ALTHOUGH THE COURT is satisfied there is no present emergency warranting immediate action by this Court and the parties presently before the Court are working to address concerns previously identified by the Court in this case, the Court has been apprised by the

Monitor, Mr. Joe G. Moore, Jr., an emergency situation concerning the Edwards Aquifer was only narrowly averted this year. The Monitor further advises the Court an emergency situation in 1995 is highly possible unless the recharge area experiences extremely heavy rainfall.

The Court believes, therefore, the Monitor should be directed to work with the parties now before the Court, with other regional interests, with members of the Texas Legislature, and with other appropriate State and Federal officials in an effort to mediate and resolve water resource management and endangered species issues in a manner that will address concerns previously identified by the Court and avoid further Court intervention

. . .

Creation of a Panel

IT IS ORDERED the Monitor shall create and chair a Panel whose primary purpose it is to develop incidental take permit applications pursuant to § 10(a) of the A, 16 U.S.C. § 1539(a). . . .

IT IS FURTHER ORDERED all parties and non-parties and their representatives are strongly urged to cooperate fully with the Monitor so the Monitor can perform his duties to the best of his abilities, as efficiently as possible, and at the lowest possible cost. In this regard, the Court notes both the Texas Natural Resource Conservation Commission ("TNRCC") and the EUWD, in their pleadings and presentations to the Court, have offered their substantial resources and expertise to assist the Court at their own cost. The Court also understands

counsel for Federal Defendants has made similar offers on behalf of the United States Geological Survey ("USGS"), an agency within the Department of the Interior. Accordingly, the TNRCC, EUWD and USGS are strongly urged to follow through on their offers and provide substantial assistance to the Monitor by making available necessary personnel and adequate resources to allow those personnel to respond promptly and thoroughly to the Monitor's requests. The Monitor may request such assistance from particular individuals within each agency, and the TNRCC, EUWD, and USGS are strongly urged to accommodate these requests if at all possible.

. . .

IT IS FINALLY ORDERED in the event the Panel does not reach consensus on any issue essential to the completion of its business, the Monitor shall so advise the Court. The Monitor shall provide a written Panel Progress Report to the Court at least every ten (10) days indicating the progress being made by the Panel and any problems which could have effect on the successful completion of the Panel's mission.

SIGNED this 30th day of September, 1994.

/S/
HONORABLE
LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE